

## Update: Sexual Assault Benchbook

### CHAPTER 3

#### Other Related Offenses

#### 3.7 Child Sexually Abusive Activity

##### E. Pertinent Case Law

##### 4. Definition of Terms

Insert the following case summary at the bottom of page 137:

“Distributes” is not defined in MCL 750.145c. In *People v Tombs*, \_\_\_ Mich App \_\_\_, \_\_\_ (2003), the Court of Appeals stated that the word “distributes” “comprises several definitions that each describe different conduct” and is therefore ambiguous. In order to provide meaning to the word “distributes,” the Court turned to the legislative purpose behind the statute. The Court concluded that a narrow construction of “distributes” properly avoids criminalizing transferring material to authorities or disposing of material. Therefore, “distributing” requires the “intent to disseminate child sexually abusive materials to others.” *Id.* at \_\_\_.

In *Tombs*, the defendant was convicted of distributing child sexually abusive material. As a part of the defendant’s employment, he was given a laptop computer to use. When the defendant quit his job, the employer retrieved the laptop and found child sexually abusive material on the computer’s hard drive. A jury found the defendant guilty of distributing child sexually abusive material for “distributing” the material through the laptop computer to his employer. On appeal, the defendant claimed that he did not intend to distribute child sexually abusive material. The defendant indicated that he believed the company was going to erase the hard drive without viewing its contents. The Court of Appeals reversed the defendant’s conviction, holding that in order to prove that a defendant “distributed” the material, the prosecutor must prove that the defendant intended to disseminate the material. *Id.*

## CHAPTER 3

### Other Related Offenses

#### 3.11 Dissemination of Sexually Explicit Matter to Minors

Effective January 1, 2004, 2003 PA 192 amended MCL 722.671 et seq., regarding the dissemination of sexually explicit matter to minors. Beginning on page 144, replace the text in Section 3.11, subsections (A), (B), (C), and (D) with the following text:

##### A. Statutory Authority—Disseminating and Exhibiting

A person is guilty of disseminating or exhibiting sexually explicit matter to a minor\* under MCL 722.675(1) if that person does either of the following:

“(a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.

“(b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors.”

##### 1. Mens Rea

“Knowingly disseminates” means that the person “knows both the nature of the matter and the status of the minor to whom the matter is disseminated.” MCL 722.675(2).

A person knows the nature of the matter if the person is either “aware of its character and content” or “recklessly disregards circumstances suggesting its character and content.” MCL 722.675(3).

A person knows the status of a minor if the person is “aware” that the minor is under 18 years of age or “recklessly disregards a substantial risk” that the minor is under 18. MCL 722.675(4).

##### 2. Statutory Exceptions

MCL 722.675 does not apply to the persons, entities, and occupations under MCL 722.676(a)-(f), which are listed as follows:

“(a) A parent or guardian who disseminates sexually explicit matter to his or her child or ward.

“(b) A teacher or administrator at a public or private elementary or secondary school that complies with the revised school code [MCL 380.1-380.1852], and who disseminates sexually explicit matter to a student as part of a school program permitted by law.

\*For purposes of this offense, a “minor” is a person under age 18. MCL 722.671(d).

“(c) A licensed physician or licensed psychologist who disseminates sexually explicit matter in the treatment of a patient.

“(d) A librarian employed by a library of a public or private elementary or secondary school that complies with the revised school code, [MCL 380.1-380.1852], or employed by a public library, who disseminates sexually explicit matter in the course of that person’s employment.

“(e) Any public or private college or university or any other person who disseminates sexually explicit matter for a legitimate medical, scientific, governmental, or judicial purpose.

“(f) A person who disseminates sexually explicit matter that is a public document, publication, record, or other material issued by a state, local, or federal official, department, board, commission, agency, or other governmental entity, or an accurate republication of such a public document, publication, record, or other material.”

## B. Statutory Authority—Displaying

A person is guilty of displaying sexually explicit matter to a minor\* under MCL 722.677(1)(a)-(b) if that person:

- ♦ Possesses managerial responsibility for a business enterprise selling sexually explicit visual material that depicts sexual intercourse or sadomasochistic abuse and is harmful to minors; and
- ♦ Does either of the following:
  - knowingly permits a minor not accompanied by a parent or guardian to view that matter; or
  - displays that matter knowing its nature, unless the person does so in a restricted area.\*

### 1. Mens Rea

“Knowingly permits” means that the person “knows both the nature of the matter and the status of the minor permitted to examine the matter.” MCL 722.677(2).

A person knows the nature of the matter if the person is either “aware of its character and content” or “recklessly disregards circumstances suggesting its character and content.” MCL 722.677(3).

A person knows the status of a minor if the person is “aware” that the minor is under 18 years of age or “recklessly disregards a substantial risk” that the minor is under 18. MCL 722.677(4).

\*For purposes of this offense, a “minor” is a person under age 18. MCL 722.671(d).

\*See Section 3.11(C) for the definition of “restricted area.”

## C. Relevant Statutory Terms

“Display” means “to put or set out to view or to make visible.” MCL 722.671(a).

“Disseminate” means “to sell, lend, give, exhibit, show, or allow to examine or to offer or agree to do the same.” MCL 722.671(b).

“Exhibit” means to do one or more of the following:

“(i) Present a performance.

“(ii) Sell, give, or offer to agree to sell or give a ticket to a performance.

“(iii) Admit a minor to premises where a performance is being presented or is about to be presented.” MCL 722.671(c).

“Restricted area” means any of the following:

“(i) An area where sexually explicit matter is displayed only in a manner that prevents public view of the lower 2/3 of the matter’s cover or exterior.

“(ii) A building, or a distinct and enclosed area or room within a building, if access by minors is prohibited, notice of the prohibition is prominently displayed, and access is monitored to prevent minors from entering.

“(iii) An area with at least 75% of its perimeter surrounded by walls or solid, nontransparent dividers that are sufficiently high to prevent a minor in a nonrestricted area from viewing sexually explicit matter within the perimeter if the point of access provides prominent notice that access to minors is prohibited.” MCL 722.671(e).

“Harmful to minors” means sexually explicit matter that meets all of the following criteria:

“(i) Considered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards.

“(ii) It is patently offensive to contemporary local community standards of adults as to what is suitable for minors.

“(iii) Considered as a whole, it lacks serious literary, artistic, political, educational, and scientific value for minors.” MCL 722.674(a).

For definitions of “sexually explicit matter,” “sexually explicit performance,” “sexually explicit verbal material,” and “sexually explicit visual material,” see MCL 722.673.

#### **D. Penalties**

A violation of disseminating or exhibiting sexually explicit matter to a minor under MCL 722.675(1) is a felony punishable by imprisonment for not more than 2 years or maximum \$10,000.00 fine, or both. MCL 722.675(5). When imposing the fine, the court shall consider the scope of defendant’s commercial activity in disseminating sexually explicit matter to minors. *Id.*

A violation of displaying sexually explicit matter under MCL 722.677(1) is a misdemeanor punishable by imprisonment for not more than 93 days or a maximum \$5,000.00 fine, or both. MCL 722.677(5).

## CHAPTER 8

### Scientific Evidence

#### 8.2 Expert Testimony in Sexual Assault Cases

##### A. General Requirements for Admissibility of Expert Testimony

Effective January 1, 2004, the Michigan Supreme Court amended MRE 702. On the bottom of page 400 and the top of page 401, replace the first paragraph of subsection (A) and the note with the following text:

MRE 702 provides the standard for admissibility of expert testimony:

“If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

The staff comment to amended MRE 702 states as follows:

“The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words ‘the court determines that’ after the word ‘If’ at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court’s gatekeeping role in excluding unproven expert theories and methodologies from jury consideration.”

*Daubert* applies to scientific expert testimony; *Kumho Tire* applies *Daubert* to nonscientific expert testimony (e.g., testimony from social workers and psychologists or psychiatrists). *Daubert, supra*, 509 US at 593–94, contains a nonexhaustive list of factors for determining the reliability of expert testimony, including testing, peer review, error rates, and acceptability within the relevant scientific community. See also MCL 600.2955, which governs the admissibility of expert testimony in tort cases, and which contains a list of factors similar to the list in *Daubert*.

Replace the last bullet on the bottom of page 402 and the first paragraph and note on page 403 with the following text:

Effective January 1, 2004, MRE 702 no longer contains its former requirement that expert testimony be based on knowledge “recognized” by the appropriate scientific community. After January 1, 2004, MRE 702, as amended, succeeds Michigan’s *Davis/Frye* rule as primary authority governing the admissibility of expert scientific testimony. The amended rule’s omission of the word “recognized” impacts the efficacy of those previous Michigan court decisions that addressed the admissibility of expert testimony based on whether the information was classified as a product of those scientific or technical disciplines “recognized” as credible sources at the time of the decision. To the extent they do not conflict with MRE 702 and the guidelines contained in *Daubert* and *Kumho Tire*, cases decided under the *Davis/Frye* rule *may* provide guidance to trial courts to review the reliability of proffered expert testimony.